

Presidential Elections; Electoral College

§ 1. In General; Electoral Certificates

Under the U.S. Constitution, both the House and Senate formally participate in the process by which the President and Vice President are elected. Congress is directed by the 12th amendment to receive and, in joint session, count the electoral votes certified by the states. And if no candidate receives a majority of the electoral vote, the House of Representatives is directed to elect the President, while the Senate is directed to elect the Vice President.⁽¹⁾

This method of selecting a President, later to become known as the “electoral college,” came about as the result of a compromise after lengthy debate at the Constitutional Convention of 1787. The debate centered on

whether the President should be chosen by popular vote, by the Congress, or by some other method. Election by direct popular vote was rejected because it was believed that the people would have insufficient knowledge of the various candidates, and because it was assumed that the people would be unable to agree on a single candidate. A plan that would give Congress the power to select the President was also rejected, because of its potential threat to executive independence. Finding itself in disagreement on both plans, the convention adopted a compromise under which each state was given the power to appoint electors to be chosen in a manner specified by each state legislature. The electors in each state, who were to be equal to the total number of that state’s Representatives and Senators, would then meet and cast votes for President and Vice President.

Historically, the counting of electoral votes has been for the most part a mere formality, because the result of the electoral vote has almost invariably been the same as the result of the popular vote.⁽²⁾

1. In the Presidential election of 1800, the electors produced a tie vote by casting an equal number of votes for Thomas Jefferson and Aaron Burr. Thus the election had to be determined by the House of Representatives, which ultimately voted for Jefferson. See 3 Hinds’ Precedents §1931. For a general discussion of early electoral-count procedures, see 3 Hinds’ Precedents §§1911–1980 and 6 Cannon’s Precedents §§438–446.

2. There have been rare instances in which the result of the electoral vote

The electoral vote has generally followed the popular vote because electors came to be chosen merely as representatives of the political parties and because the state legislatures adopted a unit-rule system under which all of a state's electoral votes are to be cast for the party which wins a plurality of popular votes statewide.

The 12th amendment states in part:

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President . . . they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; [t]he President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.

On the sixth day of January after the electors of the several

has differed from the result of the popular vote. For example, in the Hayes-Tilden election of 1876, determinations by the House and Senate with respect to certain disputed electoral votes resulted in the election of Hayes, although Tilden had received a majority of the popular vote. See 3 Hinds' Precedents §§1953–1956.

states have met to cast votes for President and Vice President, the Congress, in accordance with the provisions of law,⁽³⁾ convenes in joint session,⁽⁴⁾ the Senate and House of Representatives meeting in the Hall of the House, to exercise its constitutional responsibility for counting the electoral vote.

At one o'clock in the afternoon on that day, the joint session of the two Houses is called to order by the President of the Senate,⁽⁵⁾ the individual designated by statute⁽⁶⁾ to serve as the joint session's presiding officer. Thereupon, the tellers,⁽⁷⁾ who have previously been appointed on the part of each House,⁽⁸⁾ take their respective places at the Clerk's desk. According to the alphabetical order of the states, all the previously transmitted certificates and papers purporting to be certificates of votes given by the electors are then opened by the President of the Senate and handed to the tellers.⁽⁹⁾ Each certificate so received is read by the tellers in

3. 3 USC §15.

4. See §2.4, *infra*.

5. See §2.5, *infra*.

6. 3 USC 15.

7. See §§3.1–3.4, *infra*, for appointment of tellers.

8. See §2.1, *infra*.

9. See §2.1, *infra*.

the presence and hearing of the two Houses. After the reading of each certificate, the President of the Senate calls for objections, if any.

In the event that a written objection should be raised, properly signed by at least one Senator and one Member of the House of Representatives, and when all objections so made to any vote or paper from a state have been received and read, the joint session divides, the Senate repairing to the Senate Chamber, and all such objections are submitted to and considered by each House meeting in separate session.⁽¹⁰⁾

Pursuant to the provisions of the U.S. Code, which govern the procedures in both Houses in the event they divide to consider an objection, each Senator and Representative may speak to such objection for five minutes, and not more than once; and after such debate has lasted two hours, the presiding officer of each House is required to put the main question without further debate.⁽¹¹⁾ When the two Houses have voted, they immediately again meet in joint session, and the presiding officer then announces the decision on the objections submitted.

Once all objections to any certificate or paper from a state have

been so decided, or immediately following the reading of such certificate or paper when no objections thereto are raised, the tellers make a list of the votes as they appear from the certificates.⁽¹²⁾ The result of the count is then delivered to the President of the Senate who thereupon announces the state of the vote. This announcement is deemed by law a sufficient declaration of the persons, if any, elected President and Vice President of the United States. The announcement, together with a list of the votes, is then entered in the Journals of the two Houses.⁽¹³⁾

In addition to its responsibilities in ascertaining and counting the electoral votes cast for President and Vice President, the Congress has been delegated a further constitutional duty relative to the selection of the Vice President. Pursuant to section 2 of the 25th amendment to the U.S. Constitution, whenever there is a vacancy in the Office of Vice President the President nominates a Vice President to take office upon confirmation by a majority vote of both Houses.⁽¹⁴⁾

The House and Senate also have important responsibilities

10. See § 3.6, *infra*.

11. 3 USC §§ 15, 17.

12. See 3 USC § 15.

13. 3 USC § 15.

14. See §§ 4.1–4.3, *infra*.

under the 20th and 25th amendments of the U.S. Constitution with respect to Presidential succession and disability. The 20th amendment sets forth the procedure to be followed when the President-elect and Vice President-elect fail to qualify at the commencement of their terms. Congress also has the duty, under the 25th amendment, of determining disputes as to Presidential disability.

Transmittal and Presentation of Certificates

§ 1.1 Copies of the certificates identifying the electors appointed in a state forwarded by the Governor of each state to the Administrator of General Services are, pursuant to 3 USC §6, transmitted in turn to the House; on one occasion, where a certificate was received on the day reserved for the counting of the electoral votes, the Speaker, in order that the receipt of the certificate would appear in the Record before the proceedings of the joint session to count the electoral votes, laid the communication before the House at the beginning of the session.

On Jan. 6, 1961,⁽¹⁵⁾ the Speaker⁽¹⁶⁾ laid before the House the following communication which was read and, with accompanying papers, referred to the Committee on House Administration:

GENERAL SERVICES
ADMINISTRATION,
Washington, D.C., January 6, 1961.
Hon. SAM RAYBURN,
Speaker of the House of Representatives, Washington, D.C.

DEAR MR. SPEAKER: Transmitted herewith is a copy of the certificate of ascertainment received today from the State of Hawaii, in conformity with the final clause of section 6, title 3, United States Code.

Sincerely yours,
FRANKLIN FLOETE,
Administrator.

STATE OF HAWAII.
TO THE ADMINISTRATOR OF GENERAL
SERVICES, PURSUANT TO THE
LAWS OF THE UNITED STATES.

I, William F. Quinn, Governor of the State of Hawaii, do hereby certify that the returns of votes cast for electors of President and Vice President of the United States of America, for the State of Hawaii, at an election held therein for that purpose, on the Tuesday after the first Monday in November, in the year of our Lord 1960, agreeably to the provisions of the laws of the said State, and in conformity with the Constitution and laws of the United States, for the purpose of giving in their votes for President and Vice President of the United States, for the respective terms prescribed by the Constitution of the United States, to begin on the 20th day of January in the year of

15. 107 CONG. REC. 288, 87th Cong. 1st Sess.

16. Sam Rayburn (Tex.).

our Lord 1961, were, ascertained by judgment of the circuit court of the first judicial circuit, State of Hawaii, in proceedings entitled *Herman T. F. Lum et al., v. Gavien A. Bush et al.* (Civil No. 7029), entered on the 30th day of December A.D. 1960, and that the list of persons voted for and the number of votes cast for each, pursuant to said judgment, respectively, is as follows:

Republican Party: Gavien A. Bush, 92,295; J. Howard Worrall, 92,295; O. P. Soares, 92,295.

Democratic Party: William H. Heen, 92,410; Delbert E. Metzger, 92,410; Jennie Wilson, 92,410.

And I further certify that: William H. Heen, Delbert E. Metzger, and Jennie Wilson were appointed electors of President and Vice President of the United States of America, for the State of Hawaii, at said election.

Given under my hand and the seal of the State, this 4th day of January, in the year of our Lord 1961.

WILLIAM F. QUINN,
Governor of Hawaii.

§ 1.2 Where certificates of electoral votes had been received from different slates of electors from a state, and each slate purported to be the duly appointed electors from that state, the Vice President presented the certificates, with all attached papers, in the order in which they had been received.

On Jan. 6, 1961,⁽¹⁷⁾ during proceedings in the joint session of the two Houses incident to the open-

17. 107 CONG. REC. 288-91, 87th Cong. 1st Sess.

ing of the certificates and ascertaining and counting of the votes of the electors of the several states for President and Vice President, the presiding officer⁽¹⁸⁾ handed to the tellers, in the order in which they had been received, certificates of electoral votes, with all attached papers thereto, from different slates of electors from the State of Hawaii. Without objection, the Chair instructed the tellers to count the votes of those electors named in the certificate of the Governor of Hawaii dated Jan. 4, 1961 (discussed more fully in § 3.5, *infra*).

§ 2. Joint Sessions to Count Electoral Votes

Concurrent Resolution Providing for Joint Session

§ 2.1 A concurrent resolution providing for a joint session to count the electoral votes for President and Vice President may be originated by the Senate.

On Jan. 3, 1973,⁽¹⁹⁾ Mr. Thomas P. O'Neill, Jr., of Massachusetts,

18. Richard M. Nixon (Calif.).

19. 119 CONG. REC. 30, 93d Cong. 1st Sess. For additional recent examples see 115 CONG. REC. 36, 91st Cong. 1st Sess., Jan. 3, 1969; 111 CONG.